IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 419

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

DERLYN E. MOE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
825 Citizens & Southern
National Bank Building
Atlanta 3, Georgia

Attorneys for
Eastern Air Lines, Inc.,
Petitioner

GAMBRELL, HARLAN, RUSSELL, MOYE & RICHARDSON
Atlanta, Georgia

Of Counsel

July 14, 1958.

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 419

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

DERLYN E. MOE.

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

This Court is respectfully urged to reconsider its order of June 30, 1958, denying certiorari in this case, for the following reasons:

(1) The denial of certiorari leaves in effect a sharp conflict (the existence of which is recognized by Moe, himself), between the decision of the Court of Appeals in this case and the decisions of two other circuit courts of appeals as to whether a probationary employee holds a "temporary position" within the meaning of the Universal Military Training and Service Act (62 Stat. 614, 65 Stat. 75; 50 U. S. C. 459); and

(2) The denial of certiorari leaves in effect a decision which, in practical effect, grants Moe a *promotion* (from probationary to permanent status) to which he was not automatically entitled under the applicable collective bargaining agreement—contrary to the holding of this Court in *McKinney v. Missouri-Kansas-Texas R.R.*, No. 93, decided June 23, 1958.

Background of This Case

Moe was a probationary copilot when he left Eastern's employ on March 1, 1951 to enter military service. Upon return to Eastern on December 1, 1952, Moe admits (R. 34) that he was given "the same status and seniority *except for purposes of pay* that plaintiff would have enjoyed had he continued in the employment of defendant continuously from the time of plaintiff's entering the armed forces until the time of his reinstatement to his employment . . ." (italics added).

Moe alleged that he should have been given credit *for pay purposes* for the period of his military service—that is, that he should be treated as if he had been *promoted out of* his probationary status while on military furlough and should be paid accordingly.

The applicable collective bargaining agreement provides (R. 24, 27) that a copilot "shall be on probation for an aggregate of the first twelve months of his service on flying status as a co-pilot with the Company" and that during the probationary period he may be discharged at any time without cause and without a right of hearing or appeal. This necessarily means that, during the one-year probationary period, Moe's continued employment, and his possibility of promotion to permanent status, were entirely dependent on managerial discretion.

The trial court held that Moe's probationary status was "temporary", and that in any event he was not entitled to an advance in pay based on his military service. The court of appeals reversed on both grounds.

The petition for certiorari in this case was filed September 3, 1957. The Department of Justice filed a memorandum in response to the petition, recognizing (pp. 8-9) a square conflict between the decision of the Court of Appeals in this

case and decisions in the Sixth and Seventh Circuits as to the temporary status of a probationary employee, arguing that the Court of Appeals in this case was right, and concluding (p. 17):

> "As indicated above, we believe the decision below to be clearly correct. However, we recognize that in view of the apparent conflict of circuits on the first issue discussed above (*supra*, pp. 8-13), and the similarity of the second and third issues (*supra*, pp. 13-17) to those presented by the *McKinney* case, No. 93, the Court may wish to grant the writ or to withhold action on this petition until the disposition of *McKinney*."

That statement of the Department of Justice appeared to be a clear recognition (1) that a conflict between Circuits existed which should be clarified by this Court; and (2) that the principles established in the McKinney decision probably would control the disposition of this case. Thus, when this Court affirmed the lower court (and the position of the employer) in the *McKinney* case—holding that promotional rights dependent on managerial discretion do not accrue during military service—it seemed logical to assume that the instant case would be governed by that decision, that certiorari would be granted, and that the decision of the Court of Appeals to the contrary would be reversed.

Denial of certiorari in this case, only a week after the decision in the *McKinney* case, creates a most confusing situation which, unless corrected by this Court, will inevitably lead to needless controversy and litigation.

ARGUMENT

I.

Certiorari should be granted to resolve the admitted conflict among Circuits as to the reemployment rights of a probationary employee.

This Court's rules clearly provide for the granting of writs of certiorari to resolve conflicts among the various courts of appeals. Here, the existence of a conflict is spelled out in the Memorandum filed by the Department of Justice on Moe's behalf in response to the petition for certiorari (pp. 8-9 of the Memorandum):

> "Prior to the decision in the instant case, the Sixth and Seventh Circuits had held that probationary employees held temporary positions within the meaning of the Act and were therefore excluded from its coverage. *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (C. A. 6), certiorari denied, 348 U. S. 838; *Lesher* v. *P. R. Mallory & Co.*, 166 F. 2d 983 (C. A. 7). The decision in the case at bar admittedly conflicts with these two decisions which we regard as erroneous."

The merits of this issue are thoroughly discussed at pages 31-37 of the petition for certiorari.

II.

Certiorari should be granted to conform the decision in this case to this Court's decision in the *McKinney* case.

As noted above, the Department of Justice, representing Moe, evidently thought that the decision of this Court in the *McKinney* case would control the instant case.

The principles announced by this Court in the *McKinney* decision would seem to require reversal of the Court of Appeals decision in this case. The principles thus announced which seem controlling are the following:

1. ". . . the statute does not itself create a seniority system, but accepts that set forth in the collective bargaining agreement . . ."

2. "However, Section 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from *experience, effort, or chance* to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would *necessarily* have occurred *simply by virtue of continued employment* will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained *as of right*, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher

than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but *on the exercise of discretion on the part of the employer.* On his return from service, petitioner in the present case could not have demanded under the statute that respondent place him in any group 1 position. Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1 (3) (A) of the collective bargaining agreement it is *dependent on fitness and ability and the exercise of a discriminating managerial choice. Collective bargaining agreements that include such familiar provisions are presupposed by the statute, and it is in their context that it must be placed.* See *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 527. Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability. *The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion.* Nor does it sanction *interfering with and disrupting the usual, carefully adjusted relations among the employees themselves regarding opportunities for advancement.*" (Italics added.)

3. "Since respondent was not obligated to give petitioner the higher position at all, when it did so it was not bound to give him a seniority date earlier than that to which any employee similarly promoted would have been entitled."

As noted above, and as clearly shown in the record (R. 24, 27), the collective bargaining agreement governing Moe's employment rights gives management *unrestricted discretion* (not even subject to hearing or appeal) as to

whether a probationary copilot ever is promoted to permanent status (and the higher rate of pay which goes with such promotion). During that probationary period, Moe could have been discharged without cause and without resort to the grievance procedure or any other remedy. Thus, his possibility of promotion to the next higher copilot position (second-year, *permanent* status) was fully as much dependent "on the exercise of discretion on the part of the employer" as was that of McKinney. Just as in the case of McKinney, his promotional possibilities were dependent on "experience, effort, or chance", they would not have ripened into actual promotion "necessarily . . . simply by virtue of continued employment" or "as of right, within the system of his employment . . ." On the contrary, as in the case of McKinney, his promotion was "dependent on fitness and ability and the exercise of a discriminating managerial choice."

Since the collective bargaining agreement plainly gave management full discretion as to promotion from probationary to permanent status, the lower court's decision conflicts with the Act by "overriding an employer's discretionary choice by . . . mandatory promotion", and it further interferes with and disrupts "the usual, carefully adjusted relations among the employees themselves regarding opportunities for advancement." In effect, the lower court decision tells Eastern Air Lines and the Air Line Pilots Association that they *may not* condition promotion on actual experience and proven ability, coupled with management satisfaction with such experience and ability. Yet this Court's decision in the *McKinney* case clearly says that there is nothing in the Act which prohibits such a condition.

The Justice Department's understanding that Moe would lose if McKinney lost is clearly reflected in its citation (p. 19 of its brief in the *McKinney* case) of the lower court

Moe decision for the proposition "that a veteran who under the terms and conditions of his employment would probably have obtained a higher position in his employment, but for the intervention of military service, must, upon return and upon being promoted to the higher position, be given a seniority date in that position that he would have had had he been continuously employed." Since this Court has rejected the "probability" test for promotion in the *McKinney* case, parity of reasoning requires rejection of the same test in the case of Moe.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court's order denying certiorari should be reconsidered, certiorari should be granted, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

E. Smythe Gambrell,
W. Glen Harlan,
825 Citizens & Southern
National Bank Building
Atlanta 3, Georgia

Attorneys for
Eastern Air Lines, Inc.,
Petitioner

Gambrell, Harlan, Russell, Moye & Richardson
Atlanta, Georgia

Of Counsel

July 14, 1958.

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to grounds specified in this Court's Rule 58 (2).

W. GLEN HARLAN
Of Counsel